Filed 11/16/16 P. v. Patterson CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DAVID PATTERSON, Defendant and Appellant.	B260894 Los Angeles County Super. Ct. No. BA401614

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam O. Ohta, Judge. Affirmed with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Theresa A. Patterson, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant David Patterson was convicted of forcible oral copulation, kidnapping to commit rape, assault with intent to commit sodomy, and related one-strike, firearm, and prior-conviction allegations. On appeal, he contends that the trial court abused its discretion by admitting evidence of a condom that was not used in the crime, and that his sentence for aggravated assault should have been stayed under Penal Code section 654.[1] We direct the trial court to correct the abstract of judgment to reflect its oral imposition of fines and fees. In all other respects, we affirm.

PROCEDURAL BACKGROUND

By first amended information filed October 5, 2012, defendant was charged with forcible oral copulation with a prior sex offense (§ 288a, subd. (c)(2); count 1) under the One Strike Law (§ 667.61, subd. (a), (c) [prior sex offense], (d)(2) [kidnapping], (e) [firearm]), kidnapping to commit rape (§ 209, subd. (b)(1); count 2), and assault with intent to commit sodomy (§ 220, subd. (a); count 3). The information also alleged defendant used a firearm or deadly weapon to commit each crime (§ 12022.3, subd. (a) [use of a deadly weapon in a sex offense]; § 12022.53, subd. (b) [use of a firearm in a violent offense]), and that he had two strike priors (§ 667, subd. (b)–(i); § 1170.12, subd. (a)–(d))[2] and one prison prior (§ 667.5, subd. (a)).[3]

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[1] All undesignated statutory references are to the Penal Code.

[2] On December 11, 2014, the People amended the information by interlineation to change the conviction dates of the prior strikes.

Defendant pled not guilty and denied the allegations. After a bifurcated trial at which he did not testify, a jury convicted defendant of all counts and found each allegation true. Defendant waived jury trial on the prior convictions. After a bench trial, the court found the strike priors and the prior sex offense true, but found the prison prior not true.

The court denied defendant's motion to strike the prior convictions and sentenced him to 120 years to life. The court selected count 1 (§ 288a, subd. (c)(2); forcible oral copulation) as the base term and sentenced defendant to 75 years to life—25 years to life under the One Strike Law (§ 667.61, subd. (a), (d)(1)) as it existed at the time of the offense, tripled for the two strike priors (§ 667, subd. (e)(2)(A)(i)). The court imposed 10 years for the firearm enhancement (§ 12022.53, subd. (b)), to run consecutive, and stayed the deadly-weapon enhancement (§ 12022.3, subd. (a)) under section 12022.53, subdivision (f).

The court imposed a third-strike sentence of 25 years to life for count 3 (§ 220, subd. (a); assault to commit sodomy), and added 10 years for the firearm enhancement (§ 12022.53, subd. (b)), to run consecutive. The court stayed the deadly-weapon enhancement (§ 12022.3, subd. (a)) under section 12022.53, subdivision (f). While the court concluded that the One Strike Law did not require consecutive sentencing (§ 667,

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[3] The information also charged defendant with failure to register as a sex offender (§ 290.015, subd. (a); count 4), failure to file a change of address (§ 290.013, subd. (a); count 5), and transient failure to register after moving to a residence (§ 290.011, subd. (b); count 6). The court granted defendant's pretrial motion to sever counts 4, 5, and 6, and granted the People's post-trial motion to dismiss them.

subd. (c)(6)) for count 3, it nonetheless exercised its discretion to impose a consecutive term (§ 667, subd. (c)(7)).

The court stayed count 2 (§ 209, subd. (b)(1); kidnapping to commit rape) under section 654 because the kidnapping was committed in furtherance of the other two offenses. After concluding defendant harbored different criminal objectives for counts 1 and 3, the court declined to stay either of those counts.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

1. The Assault

On February 22, 2010, 18-year-old E.G. left her boyfriend's house and began walking toward the bus stop to catch the bus to school. On the corner of 99th Street and Main Street, defendant grabbed her from behind and pressed a gun to her ribs. Defendant was speaking to her in English, but E.G., a native Spanish speaker, did not understand everything he said.[4] Defendant pushed E.G. into the front passenger seat of a blue Chevrolet SUV. The seat was reclined, and the SUV smelled of marijuana. When defendant shut the passenger door, E.G. discovered that the inside door handle was broken; she was trapped. Defendant walked around the car, got into the driver's seat, and began driving.

Once inside the SUV, defendant removed a gun from his waistband and pointed it at E.G. As he drove, defendant repeatedly motioned to her to stay down, and for the most part,

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[4] At trial, E.G. testified with the assistance of a Spanish-language interpreter.

E.G. remained reclined in the passenger seat. E.G. repeatedly begged defendant to let her go. In response, he pointed the gun at her and told her to "shut the fuck up."

After driving for 10 or 15 minutes, defendant pulled into a deserted alley and parked. He got on top of E.G., pulled her pants down, and grabbed at her underwear and vagina. E.G. tried to dissuade defendant from raping her by telling him (inaccurately) that she was pregnant. He replied, "Then it's going to be oral." Defendant removed his pants and underwear. While holding the gun in his hand, defendant pushed E.G.'s head down and forced his penis into her mouth. E.G. orally copulated defendant, which caused her to gag and nearly vomit. Next, defendant turned E.G. around, placed her face down on the reclined passenger seat, and pulled down her underwear. She felt his penis touch her backside and vagina. Defendant held E.G.'s shoulders tightly as he slid his penis up and down between her buttocks and against her vagina. Though E.G. was unsure whether defendant ejaculated, she felt a wet, slimy substance. Eventually, defendant got off of her.

E.G. dressed and asked defendant to let her go. Defendant dressed and started driving. He told E.G. to "shut up" and threatened to kill her if she contacted the police. Defendant drove for about 10 minutes, ultimately stopping the car at 99th Street and San Pedro. He leaned over and rolled down the passenger window, which allowed E.G. to open the door from the outside. Defendant repeated his warning; he told E.G. that he knew everything about her, including the identities of her boyfriend and family. Then he told her to get out of the SUV.

E.G. ran to a nearby friend's house. Although E.G. told her friend Magdalena that something awful had happened to her, she

was too ashamed to tell her the details. With Magdalena's encouragement, E.G. called her mother Alejandra, who lived in Las Vegas. She told Alejandra that a black man had "abused" her. E.G. was "hysterical"; she was crying and very upset. Alejandra said she would come to Los Angeles as quickly as possible; she got on a bus that afternoon. While E.G. waited for her mother to arrive, she spoke on the phone with her boyfriend; she could not stop crying. E.G. told her boyfriend that an African-American man with a gun had forced her into a blue car, tried to rape her, and forced oral sex on her.

Alejandra arrived at Magdalena's house around 6:00 that evening. She found her daughter crying; E.G. did not want anyone to touch her. E.G. told her mother that her attacker had taken her to an unknown location and forced her to perform oral sex. Alejandra urged E.G. to contact the police, but she was too scared; defendant had threatened to kill her if she reported him. Eventually, Alejandra prevailed.

After attempting to report the incident in person, E.G. and Alejandra returned to Magdalena's house and called 911. Two officers responded to the call. E.G. told them what happened to her—a story consistent with her testimony in court. She described defendant's vehicle as an older Chevrolet Suburban, with something wrong with the interior door handle. The officers took E.G. to the hospital, where she was examined by a member of the Sexual Assault Response Team. When E.G. left the hospital with her mother at 2:30 the next morning, she did not want anyone to look at her; she was afraid of being attacked again.

2. The Traffic Stop

On the evening of February 24, 2010, defendant was driving a blue 1995 Chevrolet Tahoe with a license plate number of 6ERH334 near 98th Street and Main Street in Los Angeles, when he was stopped by officers from the Los Angeles Police Department. Defendant's driver's license indicated that he lived at 9823 South Main Street.[5] The officers cited defendant for speeding; because he was driving with a suspended license, they also impounded the SUV. The officers told defendant he could retrieve the vehicle from the Southeast Division station.

The following day, LAPD detective Monica Cross interviewed E.G. E.G. described her attacker as a black male, six feet tall, 25–30 years old, with brown eyes and a close shave. She said that he used a small black handgun and noted the marijuana odor and broken door handle in the suspect's blue Chevrolet SUV.

3. The Identification

E.G. and her mother returned to the police station the next day, February 26, 2010, to meet with a sketch artist. While E.G. was finishing with the sketch artist in a back room, defendant arrived at the station to retrieve his SUV from the impound lot. He was accompanied by two women, one of whom later identified herself as Lakisha Patterson (Lakisha). Defendant gave his

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[5] The building is on the corner of 99th and Main Street—the intersection where E.G. was abducted in a blue Chevrolet SUV. The SUV was later discovered to include a change of address form listing the same address.

name and license plate number to Detective Sonny Patsenhann, who told him to wait in the detectives' lobby, a small area connected to the main lobby by a glass door.[6] Meanwhile, E.G. had finished describing her assailant to the sketch artist. She returned to the detectives' lobby and sat down to wait for Cross.

Seconds later, defendant and his companions walked through the door from the main lobby. E.G. and defendant made eye contact—and she recognized him immediately.[7] Defendant looked surprised, then immediately turned around and walked quickly out of the station; the women left with him. As soon as the door closed, E.G. hunched over; she was very upset—crying and covering her face. By the time Lakisha returned alone about a minute later, E.G. began talking intensely to her mother. She said she had just seen her rapist. Alejandra and E.G. jumped up, and Alejandra summoned help. Cross appeared and took the women to another room. E.G. was yelling in Spanish, "It's him. It's him." She told Cross she had just seen her attacker.

The station's security cameras captured these events. Officers searched the area, but could not find defendant. Cross, E.G., and Alejandra waited for several hours, hoping defendant would return to the station. When he failed to appear, Cross

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[6] Patsenhann arrived in the detectives' lobby a few minutes after telling defendant to meet him there, but defendant was nowhere to be found. Patsenhann spoke to a woman who had accompanied defendant to the station and told her he needed to see defendant so that he could sign the impound form—but defendant never returned to collect his SUV.

[7] The detectives' lobby is the size of a narrow hallway. Defendant passed within inches of E.G.

pulled up a photograph of him using the information defendant had provided to Patsenhann and placed it in a six-pack photo array. E.G. identified him.[8]

4. The Investigation

On March 8, 2010, LAPD criminalist Lori Leonard searched defendant's still-impounded SUV. The door handle inside the passenger door was broken off. Leonard discovered a used condom in the passenger door pocket. She also found an envelope containing a green, leafy plant material resembling marijuana, a temporary insurance card listing David Patterson and Lakisha Patterson as the insured parties, and a pair of binoculars. Leonard took swabs of two stains on the front passenger seat for biological testing.

DNA testing was performed on the condom, the seat swabs, and E.G.'s SART kit. Spermatozoa was detected on the underwear E.G. had worn at the time of the attack. The DNA profile was a mixture of at least three individuals. E.G., defendant, and E.G.'s boyfriend—with whom E.G. had "been intimate" the night before—were included as possible contributors. The condom found in the SUV contained a mixed DNA profile of two people, consistent with defendant and an unknown female; E.G. was not the female contributor. The swab taken from the SUV's passenger seat contained spermatozoa, which matched defendant's DNA.

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[8] Defendant's photograph looks remarkably similar to the rendering the sketch artist produced based on E.G.'s description.

DISCUSSION

1. The court did not abuse its discretion by admitting evidence of the condom.

Over defendant's objections that the evidence was irrelevant (Evid. Code, § 210) and more prejudicial than probative (Evid. Code, § 352), the court allowed the prosecutor to introduce evidence relating to a used condom found in defendant's SUV.[9] Defendant contends the court abused its discretion and that "the error was prejudicial in this close case[.]" We disagree.

1.1 The evidence was relevant.

Only relevant evidence is admissible (Evid. Code, § 350)—and all relevant evidence is admissible unless excluded by the constitution or by statute (Evid. Code, § 351; see Cal. Const., art. I, § 28, subd. (d)). Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' " (*People v. Carter* (2005)

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[9] While defendant challenges the admission of the condom, the condom itself was not presented at trial or admitted into evidence. Defendant appears to be challenging the photographs of the condom, which were taken during the vehicle search and admitted as exhibits 19 and 20, as well as the testimony about the DNA testing performed on it.

36 Cal.4th 1114, 1166.) A trial court has broad discretion in determining the relevance of evidence, but has no discretion to admit irrelevant evidence. (*Id*. at pp. 1166–1167) "On appeal, we review for an abuse of discretion a trial court's admission of evidence as relevant. [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057–1058.)

The court in this case explained the general relevance of evidence found in the SUV: "The issue is the alleged victim claims that the assault occurred in a particular vehicle. She then sees [defendant] at the police station and tells the police 'That's the person who committed the crime against me.' That person was ticketed and his car was impounded, and so if there is anything that is inside that car that ties the car to the defendant as the driver, it would tend to corroborate the identification that [he] is the suspect of the alleged victim. [¶] So from that perspective any evidence that ties the defendant to the car [as] the driver is probative, is relevant."

As to the condom evidence in particular, the court further explained: "I do think that the vehicle is of primary importance in determining what actually occurred in this case, whether the defendant was, in fact, possessor and driver of that vehicle and whether or not the vehicle is used for sexual activity. And the existence of a condom where there is spermatozoa, which, when tested for DNA, shows that the defendant was the donor of the spermatozoa tends to prove both, No. 1, that defendant was the possessor and driver of the vehicle; and, No. 2, that the defendant utilizes the vehicle for sexual purposes."

Because we agree with the court that the evidence tended to reasonably establish defendant's identity—an issue "of consequence to the determination of the action[]" (Evid. Code,

§ 210)—we need not determine whether its alternative rationale was correct. Accordingly, the court did not abuse its discretion by concluding the evidence was relevant.

1.2 The evidence was not unduly prejudicial or time-consuming.

A trial court may exclude relevant, otherwise-admissible evidence only if "its probative value is *substantially outweighed* by the *probability* that its admission will (a) necessitate undue consumption of time or (b) create *substantial danger* of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352, emphasis added.) "For this purpose, 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) " 'In other words, evidence should be excluded as unduly prejudicial [only] when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

In this case, the court ruled that "the evidence is highly probative . . . , and the probative value of the evidence is not substantially outweighed by" the type of undue prejudice contemplated by Evidence Code section 352. The court emphasized, however, that it would "not permit the prosecution to in any way argue that the defendant is using this vehicle as

a means of preying on women in general. That would be impermissible. I do not think that the condom shows that." We review those conclusions for an abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.)

Certainly, the condom evidence was highly probative on the issue of identity because it corroborated both E.G.'s cross-racial identification of her assailant and defendant's use of the vehicle E.G. described. The exclusion of other corroborating evidence further increased the condom's probative value. For example, the court sustained defendant's objections to the vehicle registration form and to his sibling relationship with Lakisha Patterson, evidence that could have helped establish defendant's identity and ownership of the SUV.

While this sort of corroboration always matters, it was particularly important in this case because defense counsel urged the jury not to accept E.G.'s testimony without it. In his opening statement, counsel stressed: "This is the type of trial where you have to continuously ask yourself where is the corroboration as we discussed in jury selection. What witness can verify the truth of what [E.]G. tells you. . . . In addition, you will see numerous contradictions in the statements that she gave at various times; so at the end of this trial, when you ask these important questions, you will see that there is a clear lack of proof." Indeed, during voir dire, defense counsel so stressed the importance of corroboration that the court read the relevant instructions to the prospective jurors in case counsel's remarks misled them on the law.

Weighed against the evidence's probative value, the facts that defendant used condoms and had sex in his car were not circumstances that uniquely evoked an emotional bias. While

there may have been a possibility that jurors would use the evidence for an improper purpose, mere possibility is not enough—and given the court's stern warning to the prosecutor about the permissible use of this evidence, there was no substantial danger that they would do so.[10] Thus, the court could reasonably conclude that any theoretical danger did not substantially outweigh the probative value of the evidence.

Ultimately, defendant did not demonstrate that he would be "unduly prejudiced," by the introduction of the condom evidence. Nor did he demonstrate that any potential prejudice would "substantially" outweigh the condom's probative value.[11] The physical evidence comprised two sterile photographs; the condom itself was not presented as an exhibit or sent to the jury room. Because the condom evidence was relevant and not unduly prejudicial, we hold the court did not abuse its discretion by admitting it.

Even assuming the evidence was improperly admitted, however, it is not reasonably likely that defendant would have achieved a more favorable result without it. (*People v. Watson*

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[10] Certainly, a limiting instruction would have been helpful in avoiding juror speculation—but there is no evidence that the defense requested such an instruction.

[11] Defendant also contends "the introduction of this inflammatory evidence was cumulative and clearly consumed the court's time in excess of that required for a fair trial." To the contrary, the evidence consumed very little time. The People presented the evidence through witnesses who were testifying already, and the evidence itself was but one line item on the lists of items recovered from the SUV and tested for DNA.

(1956) 46 Cal.2d 818, 836.) Contrary to defendant's assertion, this was not a close case. The other evidence of defendant's guilt was overwhelming. The prosecutor did not emphasize the condom in closing argument—and to the extent he mentioned it at all, he used it only to corroborate defendant's identity as the attacker. The jury deliberated for only three-and-a-half hours after a four-and-a-half day trial. In the end, the jurors rejected defendant's theory that E.G. was an attention-seeking liar. It is not reasonably likely that two photographs of a used condom changed their minds on that point.

2. The court was not required to stay the sentence for count 3.

Under section 654, a defendant may not be punished for more than one offense arising from a single act or indivisible course of conduct. (§ 654, subd. (a).) Thus, if each of a defendant's crimes were merely incidental to or were committed to facilitate a single objective, he may receive only one punishment. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Whether a course of conduct is divisible, giving rise to more than one punishable act, depends on the intent and objective of the actor. (*Kellett v. Superior Court* (1966) 63 Cal.2d 822, 824–825.) Here, defendant was convicted of forcible oral copulation (§ 288a, subd. (c)(2); count 1), kidnapping to commit rape (§ 209, subd. (b)(1); count 2), and assault with intent to commit sodomy (§ 220, subd. (a); count 3) (hereafter, aggravated assault) after abducting E.G. at gunpoint, forcing her to perform oral sex, and rubbing his penis against her anal opening. At sentencing, the court concluded that defendant kidnapped E.G. in furtherance of the two assaultive crimes, but that he committed each assaultive crime with a distinct criminal objective. Accordingly, the court

stayed the sentence for count 2 under section 654 but did not stay the sentence for count 3.

Defendant argues that the oral copulation and aggravated assault were part of an indivisible course of conduct undertaken to satisfy one sexual goal. Because the two crimes were committed in furtherance of a sole criminal objective, he contends, the court's failure to stay count 3 resulted in an unauthorized sentence. The People argue that defendant's sentence is valid because each act involved a separate application of force and neither was incidental to the other. We hold that substantial evidence supports the court's decision not to stay count 3.

2.1 Legal Principles and Standard of Review

"It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute itself literally applies only where such punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.] However, because the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.]

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.]

"If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).)

"Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense." (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) The court's conclusion " 'that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.' " (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) Although the question of whether defendant harbored a "single intent" within the meaning of section 654 is generally a factual one, the " 'applicability of a statute to conceded facts is a question of law.' [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5 (*Perez*).)

3. Substantial evidence supports the court's conclusion.

The California Supreme Court's decision in *Perez* "is the touchstone in determining how these general principles are to be applied to sex offenses." (*Harrison, supra*, 48 Cal.3d at p. 336.) In that case, the Court held that section 654 did not bar punishment for each sex crime committed during a continuous 45-to-60-minute attack. The defendant argued that his offenses comprised an indivisible transaction because each one furthered his "single intent and objective of obtaining sexual gratification." (*Perez*, *supra*, 23 Cal.3d at p. 550.) The Court rejected this "broad

and amorphous" view of the single "intent" or "objective" needed to trigger section 654. (*Id.* at p. 552.)

Section 654's central purpose is "to insure that a defendant's punishment will be commensurate with his culpability." (*Perez*, *supra*, 23 Cal.3d at p. 552.) "A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*Id.* at p. 553.) Accepting the "broad, overriding intent and objective . . . asserted by defendant" would thwart the statute's purpose by rewarding "the defendant who has the greater criminal ambition with a lesser punishment." (*Id.* at pp. 552–553 & fn. 5.) In short, it would elevate form over substance. The Court concluded that because none "of the sex offenses was committed as a means of committing any other [offense], none facilitated commission of any other, and none was incidental to" any other, section 654 did not apply. (*Id.* at pp. 553–554.)

Relying on this reasoning, reviewing courts "have routinely applied *Perez* to uphold separate sentences for each sex crime committed in a single encounter, even where closely connected in time. [Citations.]" (*Harrison*, *supra*, 48 Cal.3d at p. 336.) In this case, the court concluded that "the assault to commit sodomy which occurred at the end of the line of the defendant's criminal conduct, depended on a divisible intent, the intent to commit sodomy. He who commits several sex offenses is more culpable than a defendant who commits only one. . . .

"While the decision whether [section] 654 applies is not the stuff of mathematical exactitude, it also cannot be so loose as to fit all sex-related conduct under the umbrella of a single intent to commit any and all sex offenses. Thus, here when the defendant

was left dissatisfied at the oral copulation and because of the victim's protestation that she was pregnant, he attempted to commit sodomy. This intent did not arise, in my opinion, until facts evolved during the course of conduct in which the defendant changed courses. This was clearly a divisible intent, a criminal act deserving of additional punishment. I, therefore, do not find Count 3 barred by [section] 654." Substantial evidence supports that conclusion.

Defendant insists that he did not harbor distinct criminal intents or objectives because he did not find "the oral copulation sexually gratifying in its own right. If anything, [he] likely experienced sexual frustration by not being able to penetrate E.G.'s vagina on the first attempt." Since he committed aggravated assault only because he found the oral copulation unsatisfying, defendant argues, he cannot be punished for both. Put another way, defendant contends that he committed both oral copulation and aggravated assault in furtherance of one goal—sexual gratification. In light of the *Perez* Court's rejection of just this argument, defendant's reliance on that case is inapt.[12]

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[12] Defendant's reliance on *People v. Latimer* is also inapt. (*People v. Latimer*, *supra*, 5 Cal.4th 1203.) In *Latimer*, the defendant kidnapped the victim to facilitate two brutal rapes. As in this case, the Court reluctantly concluded that section 654 barred additional punishment for kidnapping. (*Id.* at pp. 1207–1216.) Separate punishment for each of the rapes, however, was proper. (*Id.* at pp. 1216–1217.) We do not read *Latimer* as limiting the holdings in *Perez*, discussed *ante*, or *Harrison*, discussed *post*. To the contrary, the *Latimer* Court cited both cases as examples of decisions that "have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but *consecutive* objectives permitting multiple punishment." (*Latimer*, at pp. 1211–1212) To

To the extent defendant argues that his specific objective—vaginal rape—was, as a legal matter, narrower or less amorphous than the goal of sexual gratification at issue in *Perez*, the Supreme Court has rejected that argument as well. (*Harrison*, *supra*, 48 Cal.3d at pp. 336–338.)

In *Harrison*, the defendant broke into the victim's bedroom and forcibly inserted his finger into her vagina three times. (*Harrison*, *supra*, 48 Cal.3d at pp. 325–326.) Since the victim was able to struggle free, each insertion lasted only seconds, and the entire incident lasted just a few minutes. (*Ibid.*) The defendant argued that "only *one* sexual penetration would have occurred but for . . . *the victim's* efforts to defend herself, which interrupted the initial vaginal penetration and caused subsequent repenetrations." (*Id.* at p. 338.) The Court found this argument unpersuasive. Relying on *Perez*, the Court held that "the nature and sequence of the sexual 'penetrations' or offenses defendant commits is irrelevant for section 654 purposes." (*Ibid.*) While each penetration occurred as part of a continuous, sexually assaultive encounter, defendant's actions did not comprise a single, *indivisible* course of conduct.

In this case, defendant urges that he should not be punished for aggravated assault because he committed that crime only after forcible oral copulation turned out to be an unsatisfying substitute for his real goal of vaginal rape. "By the

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forestall any confusion about whether it approved of this approach, the Court stressed "that nothing we say in this opinion is intended . . . to question the validity of decisions finding consecutive, and therefore separate, intents[.]" (*Id.* at p. 1216.)

same token, however, defendant should also not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim,"—an opportunity that presented itself when E.G. gagged on his penis—"he voluntarily resumed his sexually assaultive behavior." (*Harrison*, *supra*, 48 Cal.3d at p. 338) We thus conclude, as a legal matter, that even if the aggravated assault was committed in furtherance of the specific goal of vaginal rape, section 654 does not apply. (See *Harrison*, *supra*, 48 Cal.3d at pp. 336–338; *People v. Latimer*, *supra*, 5 Cal.4th at pp. 1211–1212, 1216–1217.)

4. The abstract of judgment is inaccurate.

The sentencing court must impose a $40 court security fee (§ 1465.8) and a $30 criminal conviction assessment (Gov. Code, § 70373) on every criminal conviction, including counts stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483–484.) The court in this case properly imposed these fees on all three counts, resulting in a total court security fee of $120 and a total criminal conviction assessment of $90. The abstract of judgment, however, reflects a criminal conviction assessment of only $30.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, "[c]ourts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*), may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of sentence (*id.* at pp. 185–188). The abstract of judgment in this case is inaccurate. We therefore direct the court to amend it to

reflect a $90 criminal conviction assessment (Gov. Code, § 70373) and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect a $90 criminal conviction assessment (Gov. Code, § 70373) and to forward a copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J. STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.